IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

AKKAD V. NEBRASKA HEART INSTITUTE

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HAYSAM AKKAD, M.D., APPELLEE AND CROSS-APPELLANT,
V.
NEBRASKA HEART INSTITUTE, P.C., A NEBRASKA CORPORATION,
APPELLANT AND CROSS-APPELLEE.

Filed April 10, 2012. No. A-11-572.

Appeal from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed.

David A. Domina and Brian E. Jorde, of Domina Law Group, P.C., L.L.O., for appellant.

James B. McVay, of Tiedeman, Lynch, Kampfe & McVay, for appellee.

SIEVERS and CASSEL, Judges.

SIEVERS, Judge.

In this lawsuit, Haysam Akkad, a cardiologist formerly employed by, and a shareholder of, the Nebraska Heart Institute, P.C. (NHI), sues to recover his share of NHI accounts receivable (AR) which he claims are due to him under a written agreement with NHI. NHI denied his claim and defends on the ground that he did not comply with a number of preconditions for payment of the AR moneys. The trial court sided with Akkad and awarded him $169,320. NHI appeals, and Akkad cross-appeals, seeking prejudgment interest and an award of attorney fees. We affirm the decision of the district court in all respects.

FACTUAL BACKGROUND

Akkad is an interventionist cardiologist who began working for NHI in 2003. By early 2008, he was one of seven cardiologists staffing NHI's office in Omaha, Nebraska, which includes an office at Clarkson Hospital in Omaha as well as an office at Alegent Hospital in Papillion, Nebraska. On January 15, 2008, all of the NHI doctors except Akkad quit without notice and immediately left to work for Alegent Hospital in Papillion. NHI decided to close its

Omaha office as it concluded it was unable to provide appropriate care for patients in what had been a seven-cardiologist operation with only one cardiologist, Akkad. Within 2 months, NHI's Omaha office at Clarkson Hospital was effectively transferred to the University of Nebraska Medical Center (NMC). Akkad began working for NMC on March 15, but continued seeing his former NHI patients at the same physical location where he formerly worked. While NMC took over the lease and physical space, NHI paid NMC consideration of $15,000 and NMC stepped into NHI's place at Clarkson Hospital under the terms of a negotiated "custody agreement" effective March 15. A somewhat similar arrangement occurred between NHI and Alegent Health Clinic, with the latter paying NHI $25 apiece for 5,472 patient records, plus slightly over $100,000 for furnishings and equipment at the Papillion office.

Akkad began working at NHI as a cardiologist in the late fall of 2003. He was given the right, if successful, to acquire an ownership interest in NHI. The arrangement worked to the satisfaction of both parties, and on December 7, 2005, the parties executed an "EMPLOYMENT AGREEMENT (Shareholder)." The agreement is 13 single-spaced pages, and thus, we shall limit our summary of the agreement to the portions crucial for this litigation. The paragraph entitled "Duties" provides: "The employee shall be assigned by Employer to a principal location of practice. In addition to Employees principle location. Employee may also be scheduled on rotation or as mutually agreed to provide services in Employer's other clinics or location." There is no dispute that Akkad was hired to work in NHI's Omaha clinic, and he did so, although he occasionally worked at other locations where NHI had clinics or sites.

The above-quoted provision is of import because when six of the seven cardiologists suddenly left the Omaha clinic on January 15, 2008, the executive committee of NHI made the decision to close its Omaha clinic, although Akkad expressed his desire to continue working at the Omaha clinic. The executive committee determined that doing so was not feasible and arranged to transfer the Omaha clinic to NMC--essentially in its entirety. Akkad was asked to relocate to NHI's clinic in Lincoln, Nebraska, which he declined to do. He worked at the NHI Omaha clinic through March 14, and the next day, he began work at the same location, which became a NMC clinic that day. Akkad was paid for the value of his NHI stock as of March 14, 2008, in the amount of $69,443, for which he had paid the required amount of $30,000 in order to gain employee shareholder status. There is no dispute that the buyback of his stock was completed properly and that $69,443 is the correct amount.

While neither party was able to produce a copy of Akkad's resignation letter, a letter of February 8, 2008, from Thomas Burnell, NHI's chief executive officer (CEO), acknowledges receipt of such a letter from Akkad dated February 5, 2008. There are a number of things of significance in this letter starting with recitation of the fact that NHI was "currently" negotiating with NMC "regarding facilities, equipment and medical records." Further, the letter recites, "Since you will be employed by or affiliated with NMC effective March 15, 2008, your shareholder status along with your salary and dividend distributions will cease as of March 14, prorated to that date." The evidence shows that at a shareholders meeting on January 16, the decision was made to close the Omaha office, despite Akkad's presentation to the group asking that it be kept open. Thus, by February 8, a plan was in place for closure of the Omaha office, transfer of such to NMC, and for Akkad to become affiliated with NMC and cease his employment with NHI. Burnell's letter further states: "You have chosen not to execute the

Goodwill agreement, therefore you will not be entitled to any accounts receivable." This statement is not true as the evidence shows that Akkad and then-CEO, Sheryl Dodds, both signed the "Good Will Payment and Non-Compete Agreement" (Goodwill Agreement) on December 7, 2005.

This dispute has its origin in the Goodwill Agreement, which was executed by Akkad and NHI on December 7, 2005, when Akkad become an employee shareholder in NHI by paying the required $30,000 for his shares of stock, which he did. Additionally, Akkad was required to "purchase . . . proportional assets of accounts receivable," as the transaction was described by Burnell, NHI's CEO. Akkad did this by monthly deductions from his salary over 9 months totaling a cost of $140,322.

Once Akkad became a shareholder, in the event his employment was terminated, he would be "disqualified" under the NHI bylaws from owning shares in NHI. Thus, he was entitled to be paid the book value for his shares, which, as mentioned above, occurred when he was paid $69,443. Additionally, he claims in this lawsuit that he is entitled to receive, according to the terms of the Goodwill Agreement, a share of NHI's accounts receivable. The parties have agreed and stipulated that the correct figure for such, if payable, would be $169,320. This case simply comes down to the question of whether the Goodwill Agreement is enforceable.

The preamble of the Goodwill Agreement recites, inter alia, that "the Corporation is willing to pay a departing shareholder a portion of the Corporation's post departure gross receipts in consideration for the Shareholders covenants herein not to damage or interfere with the Corporation." We set forth the shareholder's covenants in their entirety:

> 2. Non-Compete Covenant. Upon the Corporation being obligated to make payment to the Shareholder under this Agreement, the Shareholder agrees for a period of one (1) year thereafter to not either directly or indirectly, whether as an employee, partner, shareholder, sole proprietor, or otherwise, engage in the practice of cardiology, cardiovascular surgery or thoracic surgery within the State of Nebraska.
>
> 3. Impugning Reputation. Upon the Corporation being obligated to make payment to the Shareholder under this Agreement, the Shareholder agrees not to criticize the Corporation nor any physician or staff member of the Corporation to anyone outside the Corporation, except as required by law, professional ethics or medical staff bylaws, and shall not at any time disclose or furnish anyone, other than the Corporation, the names or addresses of any of the patients of the Corporation, or disclose any information received by him or her during the course of his or her stock ownership with regard to the personnel, financial or other affairs of the Corporation or its employees, and shall keep all such information confidential.

The Goodwill Agreement provided that upon purchase of a departing shareholder's stock, and upon "written notice by the Shareholder to the Corporation within thirty (30) days of such redemption or purchase that the Shareholder agrees to abide by" the covenants set forth above, and that the Corporation shall pay

> the Shareholder a share of the total amount of the Corporation's accounts receivable as of the date of the event triggering the redemption or purchase of the Shareholder's stock under the Bylaws of the Corporation ("Redemption Date"). The term "Corporation's

> accounts receivable" shall mean all accounts receivable of the Corporation, as adjusted by the Corporation in the ordinary course of business in accordance with its policies and accounting practices . . . equal to the Shareholder's latest "fractional interest" . . . .

The bylaws of NHI as written at the time Akkad became an employee contained a provision that prohibited the AR from being included in the calculation of book value of a shareholder's stock. After Akkad became a shareholder, he was on NHI's executive committee. The bylaws were amended in 2006 in several respects not pertinent here while Akkad was on the executive committee, but the bylaws retained the prohibition that AR "shall not be considered an asset of the Corporation for determining the book value of stock to be redeemed." However, Burnell, NHI's CEO, testified that the AR were an asset of the corporation, despite this provision in the bylaws. But, Akkad's claim is not that book value of the stock includes the AR; rather, his claim relies solely upon the Goodwill Agreement.

Nebraska Heart Institute advances a number of reasons why Akkad is not entitled to a share of the AR:

- The bylaws prohibit the corporation from paying any portion of the AR to a departing shareholder, and the corporate bylaws cannot be exceeded or circumvented by contracts that ignore them, such as the Goodwill Agreement.
- Akkad declined to move to Lincoln, and the corporation was empowered by the shareholder employment agreement to "assign Akkad to a principal location of practice."
- The decision to close the Omaha office was driven by patient safety considerations, not a voluntary waiver of rights to forgo Akkad's obligations under the Goodwill Agreement.
- Akkad waived his right to payment of the AR when he took new employment and helped cut off NHI's income stream and deliver it to his new practice, which also amounts to an estoppel.
- Akkad's Goodwill Agreement is invalid because it is contrary to the bylaws and thus is ultra vires and unenforceable.

DISTRICT COURT DECISION

The district court found that after the sudden departure of the six Omaha physicians, the corporation, over Akkad's objection, determined to close the Omaha office--which the evidence shows involved a facility at Clarkson Hospital in Omaha and one at Alegent Hospital in Papillion that were served by Akkad and the six departing physicians. The court found that the Goodwill Agreement must be considered in pari materia with the employee shareholder agreement and that the covenant in the noncompete portion that prohibited Akkad from practicing cardiology anywhere in Nebraska was overly broad and unenforceable and thus not a precondition to payment of Akkad's share of the AR. To the extent that the noncompete covenant would prevent Akkad from practicing cardiology in the city of Omaha, the court also found that NHI had waived such by closing its Omaha office, and that working in Omaha was part of Akkad's contract with NHI. Although the court awarded Akkad the stipulated amount for his share of the AR, it denied his request for prejudgment interest and attorney fees. NHI has perfected this timely appeal.

ASSIGNMENTS OF ERROR

NHI assigns six errors which we consolidate and restate as five. The claimed errors are that the district court erred in (1) awarding Akkad his AR moneys despite his refusal to relocate to Lincoln, despite the abrupt loss of its Omaha physicians, and despite his continuation of his cardiology practice with NMC; (2) awarding Akkad his AR moneys despite Akkad's failure to prove the condition precedent to receiving such in the Goodwill Agreement; (3) failing to recognize that NHI's bylaws prohibited payment of the AR, making the provision for such in the Goodwill Agreement ultra vires and a voidable act; (4) finding that NHI waived its contractual defenses by closing its Omaha office; and (5) rendering a judgment inconsistent with the doctrine of mutuality.

CROSS-APPEAL

Akkad has filed a cross-appeal in which he first claims that the district court erred in finding that there was a reasonable controversy making his claim unliquidated, thereby precluding an award of prejudgment interest. Second, he claims that the court erred in finding that the AR moneys were not "wages" under the Nebraska Wage Payment and Collection Act, thereby precluding an award of attorney fees.

STANDARD OF REVIEW

The meaning of a contract and whether a contract is ambiguous are questions of law. *Kluver v. Deaver*, 271 Neb. 595, 714 N.W.2d 1 (2006). On a question of law, an appellate court is obligated to reach a conclusion independent of the determination reached by the court below. *Id*. Other applicable standards of review will be set forth in our analysis.

ANALYSIS

Do NHI Bylaws Prohibit Payment of AR to Departing NHI Shareholder as Is Provided for in Goodwill Agreement?

While the question we have posed embodies NHI's third assignment of error, we believe that this fundamental question should be addressed first, as an affirmative answer would render discussion of the other claimed errors unnecessary. NHI asserts that the trial court did not consider the bylaws and that they must be considered in conjunction with the other key documents defining Akkad's relationship with NHI. NHI asserts that the "bylaws are a contract between a company and its shareholders." Brief for appellant at 38. However, the notion that payment of the AR to a departing shareholder is wholly prohibited and that the Goodwill Agreement providing otherwise is void as ultra vires is a creative, but less than accurate, reading of the bylaws. The only mention of the AR in the bylaws is found at article VI, "Certificates for Shares and their Transfer," which contains provisions dealing with the redemption of shares for a "disqualified" shareholder. Given that article II, section 1, provides that only those who are "professional employees" of the corporation are entitled to own shares in NHI, Akkad would become "disqualified" as of March 15, 2008, pursuant to the February 8, 2008, Burnell letter. Under article VI, a disqualified shareholder is entitled to be paid the book value of his stock, and as we have related, this was done, and there is no dispute about the redemption value of Akkad's

NHI shares. Granted, the bylaws provide at article VI, section 5, that the AR "shall not be considered an asset of the Corporation for determining the book value of the stock to be redeemed." In this case, the AR were not considered in valuing Akkad's stock redemption amount, nor does he claim that such should have been.

Words used in a contract must be given their plain and ordinary meaning as ordinary, average, or reasonable persons would understand them. *Bass v. Dalton*, 213 Neb. 360, 329 N.W.2d 115 (1983). Clearly, this prohibition is for a limited purpose, as the AR are not included in calculating the book value of stock. But such restriction does not prohibit a contractual arrangement between NHI and its shareholders that would result in payments for the AR--as long as the payments were not for redemption of stock. The right to payment for the AR at issue here flows from a contractual arrangement between NHI and Akkad designed to preserve the goodwill of the company and which, in return, provides for payment of a share of the AR to the disqualified shareholder. Article V, section 1, says that the executive committee can authorize any officer or agent to "enter into any contract . . . in the name of and on behalf of the company." Thus, the Goodwill Agreement at issue here is clearly such a contract. The claim that the Goodwill Agreement is unenforceable because it violates NHI's bylaws is without merit.

Was Akkad Precluded From Recovery of AR Provided for in Goodwill Agreement Because He Failed to Comply With Conditions Precedent Therein?

NHI asserts that Akkad did not give notice of his intent to perform the conditions of the Goodwill Agreement. The provision at issue provides that upon redemption of the shareholder's stock and his "written notice by the shareholder to the Corporation within 30 days of such redemption or purchase that the Shareholder agrees to abide by the covenants" contained in the agreement, the corporation will pay the shareholder a share of the AR. Akkad concedes in his brief that he did not give such notice in his resignation letter or otherwise. NHI's very short argument on this issue simply asserts that Akkad did not comply with any "conditions precedent that activate the defendant's duty." Brief for appellant at 27, citing *Henriksen v. Gleason*, 263 Neb. 840, 643 N.W.2d 652 (2002). *Henriksen* simply has the well-known black letter proposition, "In order to recover in an action for breach of contract, the plaintiff must plead and prove the existence of a promise, its breach, damage, and compliance with any conditions precedent that activate the defendant's duty." *Id*. at 847, 643 N.W.2d at 658.

In response, Akkad directs our attention to our opinion in *Villanueva v. City of South Sioux City*, 16 Neb. App. 288, 743 N.W.2d 771 (2008), where we found that substantial compliance with the claimant's notice requirements under the Political Subdivisions Tort Claims Act was sufficient when the City had ample opportunity to determine whether to comply with the demand or defend the litigation arising from the claim. In Akkad's testimony, he asserted that in his resignation letter he had demanded his AR payments, and although that letter cannot be found, Burnell's response to it tends to corroborate this testimony in that Burnell said Akkad would not be receiving the AR, although the reason was said to be because he had not executed the Goodwill Agreement, not because he had not given the required notice. But Akkad indisputably had executed the Goodwill Agreement.

In any event, as Akkad's brief points out, Burnell and Akkad were both fully cognizant of the fact that NMC was taking over NHI's Omaha facility at Clarkson Hospital, and Akkad would be employed by NMC after March 14, but that prior to that time, Akkad would remain a NHI employee and continue to operate the Omaha office after the departure of the other six doctors on January 15. It is noteworthy that in his February 8 letter to Akkad, Burnell warned:

> Dr. Akkad, through March 14, it must remain business as usual . . . **Failure to fulfill your professional obligation will be considered a breach of your contract** . . . as you know NHI has a good relationship with NMC and its affiliates so we expect you to act professionally and fulfill your obligation to NHI until the end of your employment.

(Emphasis in original.) The end of Akkad's employment by NHI was, by mutual agreement between Akkad and NHI's CEO, Burnell, to be March 14, after which Akkad would begin with NMC--at the same physical facility. In fact, NHI asserts that all Akkad did was put on a laboratory coat that said NMC instead of NHI as he had worn the day before.

The Goodwill Agreement had three covenants in it, and compliance therewith generated Akkad's right to his share of the AR. They are, in abbreviated form: not to practice cardiology anywhere in Nebraska for 1 year; not to impugn NHI, its practices, or its physicians in any way; and not to disclose any information received by Akkad while a shareholder about the personnel, financial, or other affairs of NHI, and to keep all of such information confidential.

With respect to the second and third covenants, the evidence is clear from Burnell that NHI makes no claim, nor does it have any information, that Akkad has not followed those covenants completely. Thus, NHI has obviously suffered no prejudice from Akkad's failure to give written notice of his intent to comply with those two covenants. And, as Akkad points out in his brief, he hardly could give written notice of intent to comply with the first covenant, not to practice cardiology in Nebraska, when he and NHI were both fully aware that he would switch over to working for NMC as a cardiologist on March 15, 2008, as NMC took over NHI's Omaha clinic at Clarkson Hospital pursuant to the custody agreement that NHI and NMC negotiated and signed. Although the management of NHI had made the decision to close the Omaha clinic upon the departure of the other physicians, it would continue to operate with Akkad as the only physician until the takeover by NMC on March 15.

Moreover, under the Goodwill Agreement, Akkad had to give written notice of his intent to comply with the covenants within 30 days of the redemption and purchase of his stock--which occurred on March 28, 2008, when NHI paid Akkad $69,443 for his stock. Thus, he actually had until April 28 to give the notice, but Burnell had already advised him in his letter of February 8 that he would not be paid any of the AR moneys. Thus, the failure to give notice was not the basis for the refusal to pay Akkad for the AR, since that decision was made and transmitted to Akkad on February 8--long before any written notice would be due. In short, giving notice that he would not practice cardiology would be an empty and meaningless gesture when Akkad and NHI knew and consented to his doing so at the NMC clinic, which used to be the NHI clinic. The Nebraska Supreme Court in *Davidson v. First Am. Ins. Co.*, 129 Neb. 184, 184, 261 N.W. 144, 147 (1935), said, "The law does not ordinarily require the performance of futile acts, the maxim of the common law being, 'The law will not force any one to do a thing vain and fruitless.'"

Thus, we conclude that the notice requirement was waived, and in any event, under these facts, giving notice would be untrue and futile.

Further, logic dictates that failure to give notice of intent to comply with a noncompete agreement whose principle requirement is void cannot be the determinant of whether the former employee gets the benefit provided for in the agreement. In other words, if a material provision of a noncompete agreement is void and unenforceable, notice of intent to comply with such is not a prerequisite to recovery. The district court found that the restriction on Akkad's ability to work as a cardiologist in Omaha was overbroad and void. Thus, we now turn to this key issue, even though we note that NHI did not assign error to the district court's finding that the covenant was void and unenforceable. Rather, in its argument on the subject of Akkad's failure to give notice, NHI asserts that "[w]aiver occurred because Akkad voluntarily took new employment, cut off or helped cut off Neb Heart's income stream and diverted it to his new practice." Brief for appellant at 26. Frankly, this argument seems strange given the decision by NHI's management to close the Omaha practice and no longer have a presence in Omaha, despite Akkad's desire to maintain and operate the Omaha clinic. NHI chose to eliminate itself from the "Omaha market."

Nebraska courts are generally more willing to uphold promises to refrain from competition made in the context of the sale of the goodwill of the business than those made in connection with employment contracts. *H & R Block Tax Servs. v. Circle A Enters.*, 269 Neb. 411, 693 N.W.2d 548 (2005). In *H & R Block Tax Servs.*, 269 Neb. at 418, 693 N.W.2d at 554, we further held:

> In the employment context, the validity of a covenant not to compete aimed at preventing a former employee from unfairly appropriating customer goodwill is no greater than reasonably necessary "only if it restricts the former employee from working for or soliciting the former employer's clients or accounts with whom the former employee actually did business and ha[d] personal contact." *Polly v. Ray D. Hilderman & Co.*, 225 Neb. at 668, 407 N.W.2d at 756. We have applied this test strictly. See *Professional Bus. Servs. v. Rosno*, 268 Neb. 99, 680 N.W.2d 176 (2004).

The Supreme Court's opinion in *Polly v. Ray D. Hilderman & Co.*, 225 Neb. 662, 665, 407 N.W.2d 751, 754 (1987), quoting *American Sec. Servs. v. Vodra*, 222 Neb. 480, 385 N.W.2d 73 (1986), articulated three considerations to test the validity of a partial restraint on trade in a covenant not to compete:

> "'First, is the restriction reasonable in the sense that it is not injurious to the public; second, is the restriction reasonable in the sense that it is no greater than is reasonably necessary to protect the employer in some legitimate interest; and, third, is the restriction reasonable in the sense that it is not unduly harsh and oppressive on the employee.'"

Depriving the entire state of Nebraska of the services of a highly specialized physician like Akkad, an interventional cardiologist, is certainly arguably injurious to the public--particularly to someone who needs his specialized skills. Given that approximately 95 percent of Akkad's work since beginning with NHI in 2003 was in Omaha, excluding him from working anywhere in Nebraska is not reasonably necessary to protect any legitimate interest of NHI. And, clearly the restriction is harsh and oppressive to Akkad. In sum, the noncompete portion of the Goodwill Agreement, which we note is in the employment context rather than involved in the sale of the business of NHI, quite obviously violates these basic rules. The restriction is not that Akkad cannot work for or solicit NHI patients with whom he worked--remembering that under the custody agreement with NMC all of NHI's patient records from the Omaha clinic at Clarkson Hospital would be transferred to NMC, where NHI knew Akkad would be working. Rather, Akkad is completely prohibited from the practice of cardiology anywhere in the State of Nebraska, regardless of how he secures patients, which is clearly a restriction far greater than restricting him from contact with or working for NHI patients. And such a broad and absolute restriction on Akkad practicing his profession is not necessary to protect the goodwill of NHI, the stated purpose of the covenants.

For all intents and purposes, NHI has abandoned the Omaha "cardiology market." The fact that Akkad sees an Omaha resident who calls NMC about his chest pain is simply not damaging or interfering with NHI's goodwill--assuming that Akkad complies with the covenants not to impugn NHI or break confidences. The evidence is undisputed that Akkad has not violated these two prohibitions in the Goodwill Agreement.

Therefore, the fact that Akkad went to work as a cardiologist for NMC does not prevent the recovery of his AR share because the covenant in the Goodwill Agreement that prohibits him from doing so is void and unenforceable. And, he cannot be found to have violated the Goodwill Agreement's notice requirements, because he cannot be required to give written notice of his intent to abide by a clearly overly broad and void covenant. Finally, we should make note of the well-established principle that appellate courts do not rewrite a covenant not to compete so as to make it "no greater than is reasonably necessary." *Vlasin v. Len Johnson & Co.*, 235 Neb. 450, 455, 455 N.W.2d 772, 776 (1990). It is not the function of courts to reform unreasonable covenants not to compete solely for the purpose of making them legally enforceable. *Id.*

The district court's reasoning was slightly different than ours in that the district court found that by closing the Omaha practice, NHI "waived the non-compete agreement as it applies to [Akkad] providing competitive services in the city of Omaha." Nonetheless, we suspect the trial judge's intent was to convey the notion that since NHI has abandoned the Omaha "market," a noncompete provision that precludes Akkad from working where NHI no longer does is not a reasonable restriction designed to protect any legitimate interest of NHI. We cannot disagree, but in the end, the covenant not to compete is simply void as overly broad, and we do not rewrite it to comply with established precedents concerning such covenants. Accordingly, this assignment of error is without merit.

Did NHI Waive Its Right to Require Akkad to
Perform His Obligations to Company?

In its fifth assignment of error, NHI asserts that it "did not waive its right to require Akkad to perform his obligations to the company." Brief for appellant at 31. Here, NHI argues that its covenant that Akkad not practice cardiology anywhere in Nebraska for a year is a reasonable restraint. The argument as we understand it has something to do with the fact that it did not voluntarily close its practice, but, rather, did so "out of necessity as its physicians mutinied," and that it still sees Omaha patients in "outreach care" and thus "competes against NMC . . . for those patients." *Id*. at 32. No authority is cited for the proposition that the mere fact of competition for clients, customers, or patients makes a former employer's covenants against a former employee valid. The tests for validity are set forth in the previous section of our opinion, and NHI's proposition herein asserted is not part of the calculus.

Did Trial Court Err in Entering Judgment That Is Inconsistent With Doctrine of Mutuality?

In support of this argument, NHI advances the notion that the trial court's ruling "gives Akkad all benefits of the noncompete agreement but relieves Akkad of all its obligations." *Id*. at 33. Further, citing *De Los Santos v. Great Western Sugar Co.*, 217 Neb. 282, 348 N.W.2d 842 (1984), NHI argues that mutuality of remedy is important as an essential contracting component and that mutuality is absent when only one of the contracting parties is bound to perform.

NHI uses a mixture of factual circumstances to conclude that there is no mutuality. In summary, NHI argues that there is a lack of mutuality because (1) Akkad went to work for NMC and if he gets the AR, he is "paid twice"; (2) performance of the Goodwill Agreement by NHI is excused because it was impossible to maintain an Omaha office due to the mass departure of six of its seven Omaha physicians, meaning it could not offer Omaha employment to Akkad; (3) the departure of the physicians amounted to a "work stoppage" and that such generally gives rise to suspension of the employer's obligation, plus Akkad became part of the work stoppage when he went to work for NMC; and (4) NHI had an absolute right to assign him to work in Lincoln but Akkad chose to quit rather than move.

To the extent that we understand these arguments, we are not persuaded by any of them. Perhaps it would be of benefit to put the matter of the departing shareholder's entitlement in perspective. It seems important to point out that when Akkad became a shareholder, he was obligated to buy a share of the AR, which he did in the amount of $140,322--a fact that NHI largely ignores. Moreover, while the obligation to buy into the AR on the part of a new shareholder, as well as the obligation to buy out a departing shareholder, are contractual matters between the shareholders, the fact of the matter, according to Burnell's testimony, is that the corporation is simply a conduit for passing these funds back and forth between the shareholder doctors, even though there is no basis in the shareholder agreements or bylaws to do so, given that the obligations are between shareholder and the corporation with respect to a corporate asset--not a personal asset of the doctors working at NHI.

To further explain, when Akkad became a new shareholder of NHI, NHI withheld $16,500 per month for 9 months from his compensation for his buy-in to the AR, as estimated as of November 30, 2005. Burnell admits that the AR is a corporate asset. NHI then divided that money among 24.9 doctors (one doctor having only a 90-percent share) so that each individual doctor received an extra $661 compensation per month--except the doctor with the 90-percent share got $646. Akkad received $661 per month according to exhibit 6. This continued for 9 months, and then the AR were recalculated on an actual basis, which resulted in an overpayment by Akkad of $8,178. This money was then repaid to Akkad over 3 months with each of the other 24.9 doctors paying him $109 per month except the "90% doctor" who paid $107 per month. This is shown on exhibit 6, and Burnell admits that while the obligation is between the shareholder and the corporation, what actually happened is that the corporation handles the "pass-through" of the money between the individual doctors. In any event, the long and short of it is that there is a shareholder's obligation to buy a share of the AR from the corporation upon becoming a shareholder, and in this case, Akkad paid $140,322 to buy a piece of the corporate asset. In turn, if the departing shareholder doctor lives up to the valid covenants, he gets his share of the AR as they are at the time of the redemption of his stock--in this case, in the stipulated sum of $169,320.

Akkad's "EMPLOYMENT AGREEMENT (Shareholder)" provided that he shall be "assigned to a principal location of practice." NHI argues that his failure to relocate to Lincoln after the other six doctors left NHI means that he is not entitled to any of the AR moneys. NHI casts this as "nonperformance," brief for appellant at 25, but in doing so, ignores the uncontroverted evidence that Omaha was and had been Akkad's principal location since his NHI employment began. After the six other Omaha NHI doctors left en masse, Akkad wanted to continue to operate the Omaha facility, but the leadership of NHI voted against doing so. But, NHI had leased space, equipment, and thousands of patient files at Clarkson Hospital that it needed to deal with. What they did was pay NMC $15,000 and transfer all of such patient files to NMC effective March 15, 2008--the same date Akkad became an NMC employee to operate the cardiology practice that NHI had operated the day before. In short, NHI decided to no longer provide Akkad with his principal place of practice and consented to Akkad's hiring by NMC to operate the former Omaha practice of NHI. Thus, even if NHI could require Akkad to practice cardiology in Lincoln under his employment agreement, NHI waived any such right.

The getting "paid twice" argument as a basis for not paying the AR does not seem to have any factual or logical basis. Akkad's employment with NHI ended March 14, 2008, and his employment with NMC started the next day, March 15. So he clearly is not being paid twice in such circumstance. If it is the AR that were supposedly "paid twice," the matter of payment for the AR is a contractual matter, and at its simplest level, Akkad buys a share thereof when he comes in as a shareholder and gets whatever his share is worth when he leaves--all via contract. We cannot envision any lack of mutuality. The mutuality of performance concept seems to derive from *Farmers Underwriters Association v. Eckel*, 185 Neb. 531, 177 N.W.2d 274 (1970), and it actually deals with the equitable remedy of specific performance, which is not involved in this case. The Supreme Court spoke of the concept in *Pallas v. Black*, 226 Neb. 728, 735, 414 N.W.2d 805, 810 (1987):

> Thus, we reach the third issue, whether specific performance is an appropriate remedy. We have said that if one party cannot enforce substantial performance, equity will not decree specific performance at the instance of the other party. *Farmers Underwriters Assn. v. Eckel*, 185 Neb. 531, 177 N.W.2d 274 (1970). However, the fact that the remedy of specific performance is not available to one party to a contract is not sufficient reason for refusing specific performance to the other party. *Id*.

NHI cites us to *Eckel, supra*, but we must respectfully admit to not knowing exactly what to make of the above holding, except that in this case it does nothing to advance NHI's cause. We think that the court's discussion of mutuality in *De Los Santos v. Great Western Sugar Co.*, 217 Neb. 282, 285, 348 N.W.2d 842, 845 (1984), is more helpful in that there the court articulated the straightforward proposition that "'"[m]utuality is absent when one only of the contracting parties is bound to perform, and the rights of the parties exist at the option of one only."'"

Quoting *Garsick v. Dehner*, 145 Neb. 73, 15 N.W.2d 235 (1944). Thus, we return to the Goodwill Agreement and examine it for mutuality.

That agreement provides that NHI is obligated to pay Akkad a share of the AR if he complies with three covenants which can be reduced to (1) do not impugn NHI or anything or anybody connected with it, (2) maintain confidentially of all that you know or learned about NHI, and (3) do not practice cardiology anywhere in Nebraska for 1 year. Clearly, there is a "two way if-then" formulation in the Goodwill Agreement. If Akkad does those things, then NHI pays him his AR moneys. We have already found that the restriction on practicing cardiology in Nebraska is overbroad and unenforceable. Akkad has undisputedly complied with the other two covenants. Accordingly, this claim of error is unavailing.

CROSS-APPEAL

Akkad raises two issues in his cross-appeal: that he should have been awarded prejudgment interest and that his AR recovery entitled him to an award of attorney fees under the Nebraska Wage Payment and Collection Act (hereinafter the Act), Neb. Rev. Stat. §§ 48-1228 to 48-1232 (Reissue 2004 & Cum. Supp. 2008). The district court found that his claim was unliquidated, meaning that prejudgment interest was not due and that his recovery did not fall within the confines of the Act.

Should Akkad Have Been Awarded Prejudgment Interest?

Akkad's claim to prejudgment interest is based on Neb. Rev. Stat. § 45-103.02 (Reissue 2010), which provides that interest shall accrue on "the unpaid balance of liquidated claims from the date the cause of action arose until the entry of judgment." Thus, it follows that no prejudgment interest is allowable on unliquidated claims. Whether prejudgment interest should be awarded is reviewed de novo on the record. *Archbold v. Reifenrath*, 274 Neb. 894, 744 N.W.2d 701 (2008). Under § 45-103.02(2), prejudgment interest is recoverable only when the claim is liquidated, that is, when there is no reasonable controversy as to the plaintiff's right to recover and the amount of such recovery. This determination requires a two-pronged inquiry. There must be no dispute as to the amount due and to the plaintiff's right to recover. *Archbold v. Reifenrath, supra.* While the amount in dispute here is uncontroverted, Akkad's right to recover was vigorously contested. There were a substantial number of issues, and multiple defenses were raised. We tend to agree with Akkad's argument that NHI's noncompete clause preventing Akkad from practicing cardiology anywhere in Nebraska is obviously overbroad such that there is no reasonable controversy on that point. But, we find that there was indeed a reasonable controversy about whether NHI had waived the provision of the Goodwill Agreement requiring that Akkad give written notice of his intent to comply with the covenants before he was entitled to recover his AR moneys. Therefore, the trial court did not err in refusing to award prejudgment interest.

Was Akkad Entitled to Attorney Fees?

Akkad argues that the Act entitled him to an award of attorney fees because these moneys fall within the Act's definition of wages, and under the Act, a successful suit for wages by the employee carries with it an award of attorney fees. See § 48-1231. Whether such a fee is allowable here turns on the definition of wages as § 48-1231 provides that "[a]n employee having a claim for wages [who] secures judgment on the claim . . . shall be entitled to recover . . . an amount for attorney's fees . . . ." Section 48-1229(4) provides the applicable definition of wages, and we quote the pertinent parts thereof: "Wages means compensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been met by the employee, whether the amount is determined on a time, task, fee, commission, or other basis." We believe that the most helpful authority for this issue is *Suess v. Lee Sapp Leasing*, 229 Neb. 755, 428 N.W.2d 899 (1988) (superseded by statute on other grounds as stated in *Kinney v. H.P. Smith Ford*, 266 Neb. 591, 667 N.W.2d 529 (2003)), where plaintiff sought additional compensation from his employer claiming that the verbal employment agreement entitled him to, in addition to his base salary, 10 percent of the leasing company's bottom-line profits. Plaintiff's job was essentially to secure leases for his employer. While there was controverted testimony about his compensation and how profits were calculated, plaintiff received an award of $8,238.04 as profit sharing for 1983 and $28,192.86 as profit sharing for 1984. The court in *Suess*, 229 Neb. at 761-62, 428 N.W.2d at 904, held:

> "[The pertinent] statute defines wages as 'compensation . . . for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation.' *Id.* It is obvious that the parties' agreement for a share of profits was intended to provide compensation for the plaintiff's labor and services, and it clearly may fall within the statute's reference to compensation calculated on some 'other basis.' Standing alone these are sufficient reasons to conclude that the plaintiff's share of profits was a wage under the statute, and we so hold. . . . "

The court also spoke of a profit-sharing plan as an inducement to the employees and found that it would be incorrect to call plaintiff's right to a share of the profits a commission, although we note that § 48-1229 does provide that wages include commissions on orders delivered as well as those on file with the employer at the time of separation of the employment.

We do not believe that the recovery of the AR can be properly categorized as wages for several reasons. First of all, in Akkad's "EMPLOYMENT AGREEMENT (Shareholder)," the section on compensation recites that given the differing responsibilities, including supervisory duties, and that the proceeds received for such varies among responsibilities, the "shareholder-physicians of Employer have agreed that a fair salary for each of them is an equal salary," which pursuant to exhibit A to the agreement is $540,000 per year, unless a doctor is a fractional shareholder--of which there was one, as we alluded to earlier. The evidence is that the AR fund the operations of the corporation, obviously including the aforementioned salaries as well as its accounts payable. There is no provision in the "compensation" section of the agreement for sharing of the AR as part of compensation. And under the contractual documents, as NHI's CEO, Burnell, explained that a shareholder pays $16,500 per month upon becoming a shareholder, which is funneled to the doctors, and upon a shareholder's departure from the corporation, his share of the AR at the time of the redemption of his stock is paid back to him by the remaining doctors, although such is actually a corporation's obligation.

Thus, the only time a shareholder gets the AR moneys in addition to salary is upon leaving NHI, assuming compliance with the valid portions of the Goodwill Agreement. The amount of the AR on any particular day will obviously fluctuate, depending on a wide array of variables, meaning that what a shareholder gets back may be greater or lesser than his buy-in to the AR. But, at the core, the payment to a departing shareholder, such as Akkad, is more akin to a "return of investment" than wages. In Akkad's case, he receives some $30,000 more than he paid in, clearly the ideal outcome, but not necessarily a preordained outcome. And, it is logical that if the AR is on a steady upward trajectory, the corporation could, and likely would, increase the amount of a new shareholder's buy-in to reflect the corporation's increased volume of business and profitability. For these reasons, we conclude that Akkad's AR recovery is not wages under the Act. Thus, the trial court did not err in denying Akkad an award of attorney fees.

CONCLUSION

While our reasoning may differ in minor ways from the trial court's, we find that NHI's assignments of error are without merit, as is Akkad's cross-appeal. Therefore, we affirm the decision of the district court for Douglas County in all respects.

AFFIRMED.

INBODY, Chief Judge, participating on briefs.